
OPINION OF THE PUBLIC ACCESS COUNSELOR

CRAIG D. SEVERANCE,
Complainant,

v.

THE INDIANA GENERAL ASSEMBLY,
Respondent.

Formal Complaint No.
17-FC-242 (consolidated)

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to formal complaints alleging the Indiana House of Representatives ("House") and the Indiana Senate ("Senate") violated the Access to Public Records Act¹ ("APRA"). Jill S. Carnell, Chief Counsel for the House Republican Caucus, responded on behalf of the House. Jennifer L. Mertz, Chief Legal Counsel for the Senate, responded on behalf of the Senate. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to

¹ Ind. Code §§ 5-14-3-1 to -10

the formal complaints received by the Office of the Public Access Counselor on October 9, 2017.

BACKGROUND

Craig D. Severance (“Complainant”), filed a formal complaint with this office alleging the House and Senate violated the Access to Public Records Act by failing to respond to a records request and wrongfully denying him access to public records respectively.

Procedural History

Contextually, it is worth noting that Severance's public access dispute with the House and Senate in this matter is an offshoot of an existing legal battle between Severance and the Pleasant View Homeowners' Association, Inc. ("Association") in Fishers.

In April 2015, the Association brought an enforcement action against Severance and his wife alleging that their commercial limousine operation violated the Association's covenants against commercial operations, parking prohibited vehicles, and parking in general on their lot. In September 2015, the court issued a preliminary injunction enjoining the Severances from parking their business vehicles on the lot or adjacent streets.

On October 28, 2016, the court ordered the preliminary injunction to be dissolved based on its finding that the Association failed to comply with its own bylaws; and thus, did not have the right to bring the enforcement action against the Severances in April 2015.

Notably, Indiana Code section 32-25.5-3, which governs corporate governance for homeowner's associations, was modified with the addition of Ind. Code § 32-25.5-3-11. This new section became effective upon passage and Governor Holcomb signed the bill into law on April 12, 2017.

The trial court acknowledged that it appears the legislature cured the defect in the governance rules for homeowner's associations that doomed the Association's original enforcement action against the Severances in 2015, and may provide basis for the Association to proceed on other violations that have allegedly occurred since the law was enacted.

Severance's Records Request to IGA

Severance now seeks records related to the 2017 legislation—House Bill 1074—enacted by the legislature amending the corporate governance of homeowner's associations.

On September 21, 2017, Severance submitted to the House and Senate the following request:

1. I would like any emails, letters, citations Text Messages, Fax between January 2016 through September 2017 to or from Todd Huston, Susan Brooks, Karlee Macer, Donna Schaibley, Rep. Woody Burton, Rep. Dan Forestal, James Buck, Sen Ronald Grooms, Sen. Greg Taylor, Sen. Lonnie Randolph To or from Rachel Bibler, David Buyze, Eric Moeller, Jeffrey Bellamy, Mayor Scott Fadness, Capt Gannon, Lt, Dunbar, officer Wright , Chris Greisl, Deb Carella, Randy Truitt, Todd Huston, Susan Brooks, Karlee Macer, Donna Schaibley, Rep. Woody Burton, Rep. Dan Forestal, James Buck, Sen Ronald Grooms, Sen. Greg Taylor, Sen. Lonnie Randolph as they relate to HB 1074, Craig Severance , Cathy Severance, our address 10622 Howe Rd, Fishers In 46038 or Indy Limo Transport or Pleasantview HOA, Main Street Management, Gutwein Law.

Apply Keywords: Ordinance Violation, Craig Severance, Cathy Severance, Pleasantview, Pleasantview HOA, Limousine Business, Limousine Company, Home Business, Jeffrey Bellamy, Eric Moeller, Rick Brandau, Deb Carella, Randy Truitt, Main Street Management, Todd Huston, HB 1074, HEA 1286, Mayor, Fadness, Gannon, Dunbar, Wright

This request forms the basis of Severance's formal complaint to this office.

On September 22, 2017, Jill Carnell—on behalf of the House—responded to Severance by email acknowledging his records request. Carnell indicated that she would get back to Severance when she could with a more substantive response.

On September 26, 2017, Jennifer Mertz—on behalf of the Senate—responded to Severance by email acknowledging his records request. At the same time, the Senate denied the request altogether. The Senate concluded that Indiana Supreme Court precedent, the APRA disclosure exception for "work product," and Senate procedural rules and tradition justified the denial.

Severance then filed a formal complaint with this Office alleging the APRA violations. Notably, Severance originally filed a formal complaint against only the House. He later informed this Office of his desire to also file a formal complaint against the Senate based on the same records request and arising under the same facts. Therefore, this Office consolidated Severance's complaints and invited the Senate to respond to his allegations of an APRA violation. Both the House and the Senate deny that an APRA violation has occurred in this case.

ANALYSIS

1. The Access to Public Records Act (APRA)

APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. The General Assembly and its members constitute a public agency under APRA; and thus, are subject to its requirements.²

Therefore, unless an exception applies, any person has the right to inspect and copy the House and Senate's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, "public record" is broadly defined to mean:

[A]ny writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, the House and Senate do not argue that the records requested by Severance are public records as defined by APRA. The disagreement, at least in part, as it so frequently tends to be, is whether the records are disclosable.

² *Citizens Action Coalition of Indiana v. Koch*, 51 N.E.3d 236, 242 (Ind. 2016).

1.1 APRA's Disclosure Exclusions and Exceptions

APRA provides both mandatory and discretionary exceptions to the general disclosure requirements. For instance, certain records may not be disclosed by a public agency unless specifically required by state or federal statute or otherwise ordered by a court. *See* Ind. Code §§ 5-14-3-4(a)(1) to – (14).

Additionally, APRA lists several types of records that may be excluded from disclosure at the discretion of the public agency. *See* Ind. Code §§ 5-14-3-4(b)(1) to –(27). One of APRA's discretionary exceptions allows the General Assembly withhold the "work product of individual members and [its] partisan staffs." Ind. Code § 5-14-3-4(b)(14).

I now turn to Severance's specific complaints against the House and Senate.

2. Severance's Claim against the Indiana House

As set forth *supra*, Severance's original formal complaint to this Office appears to allege a violation of APRA by the House based on deficient response to his request.

Under APRA, a public records request submitted to a public agency in writing is considered denied seven days after it is received. Ind. Code § 5-14-3-9. Therefore, a public agency must respond to request within that timeframe to avoid a presumptive denial. A response acknowledging the request is sufficient for the initial answer and the agency does not need provide all requested records in that timeframe.

Based on the evidence presented to this Office, it is clear that the House responded to Severance's request with an

acknowledgement one day after receiving it. This does not constitute a denial under APRA. In fact, it is difficult to understand how it could. Severance's complaint narrative is unhelpful in answering this inquiry.

Equally problematic to Severance's claim is the fact that the House has stated in its response to this Office that a more substantive response to the records request is forthcoming within a reasonable time. Therefore, I conclude the House has not violated APRA.

3. Severance's Claim against the Indiana Senate

Severance also asserts that the Senate's denial of his records request violates APRA. The Senate contends the denial is permissible based on: (1) Indiana Supreme Court precedent; (2) The APRA exception for legislative "work product;" and (3) Senate tradition. Because I agree with the Senate that APRA's discretionary exception concerning legislative work product permits the denial of disclosure in this case, I need not address the remaining two arguments presented here.

3.1 APRA's "Work Product" Exception

Indiana Code section 5-14-3-4(b)(14) provides that the "work product of individual members and the partisan staffs of the general assembly" are excepted from disclosure at the discretion of the public agency.

APRA does not define work product in the context of individual legislators or their staffs. Further, it is my understanding the House has an internal rule defining its work product, however, this Office has not been made privy to that rule or an equivalent rule in the Senate.

Nevertheless, in *Citizens Action Coalition of Indiana v. Koch*, 51 N.E.3d 236 (Ind. 2016), the Indiana Supreme Court held that “only the General Assembly can properly define what work product may be produced while engaging in its constitutionally provided duties. Thus, defining work product falls squarely within a core legislative function.” *Id.*

This Office will follow suit. Since defining legislative work product is a core legislative function, as an executive branch agency, this Office will not interfere with that process.

4. Severance's Other Claims

Mr. Severance has also raised other non-access-related legal issues that exceed the statutory authority of this Office. This Office is not the forum to challenge the law making process, enacted legislation, the governance of homeowner's associations, or otherwise litigate legal issues that have been—or should be—addressed by the courts.

I am sure many people—if not most—could understand Mr. Severance's frustrations over his legal battles. Even so, most of what he is challenging is not within the jurisdiction of the Public Access Counselor. As a result, those issues are not addressed here.

CONCLUSION

Based on the foregoing it is the opinion of the Public Access Counselor that the Indiana General Assembly did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor